

**OPEN RECORDS AND MEETINGS OPINION
2006-O-08**

DATE ISSUED: May 4, 2006

ISSUED TO: North Dakota Stockmen's Association

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Timothy Purdon, asking whether the North Dakota Stockmen's Association violated N.D.C.C. § 44-04-18 by not providing copies of records within a reasonable time period.

FACTS PRESENTED

The North Dakota Stockmen's Association (Association) is responsible for recording marks and brands on livestock. The Association's chief brand inspector and its fieldmen are responsible for enforcing the brand inspection laws. These laws require all livestock to be inspected before being removed from the state. Fieldman Blaine Northrup was investigating a possible violation of the brand inspection laws by Deborah Reichman, a client of Tim Purdon's. On November 7, 2005, Mr. Northrup went to see Dennis Johnson, the McKenzie County state's attorney, to discuss the possible violation and request that Mr. Johnson file charges against Ms. Reichman for violating the law. The state's attorney asked Mr. Northrup to put his request in writing. The state's attorney also requested Mr. Northrup to investigate other times Ms. Reichman had transported livestock from North Dakota to Montana during the past five years. Mr. Northrup prepared handwritten notes regarding his investigation and left them with the state's attorney.

In a letter dated Friday, December 30, 2005, Mr. Purdon, on behalf of Ms. Reichman, requested the Association to provide, or make available for inspection the following records:

1. Any and all records, including written and/or electronic documents, including electronic mail messages, concerning, relating, or discussing brand inspections of Ms. Reichman, Ms. Reichman's relatives, employees, agents, and/or Ms. Reichman's ranching business from 2000 to the present.
2. Copies of all citations, warnings, brand inspector reports and/or fieldmen reports issued or completed by the North Dakota

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Stockmen's Association, the North Dakota Brand Board, any North Dakota brand inspector or fieldmen regarding Ms. Reichman, Ms. Reichman's relatives, employees, agents, and/or Ms. Reichman's ranching business from 2000 to the present.

The Association employs a chief brand inspector, Mr. Darryl Howard. The Association's office in Bismarck was closed on Monday, January 2, 2006, for the New Year's Day holiday. Mr. Howard received the letter requesting the documents on Tuesday, January 3, 2006.

On January 4, 2006, Mr. Howard faxed the request for records to Dennis Johnson who was conducting the criminal investigation regarding the complaint Mr. Northrup had filed against Ms. Reichman. On January 4, Mr. Howard called Mr. Johnson to ask him whether he could disclose the records, because the records related to the person being investigated and Mr. Howard did not want to disclose records that could jeopardize the criminal investigation. Mr. Johnson told Mr. Howard not to release any records until Mr. Johnson looked into the matter.

Mr. Howard also called Mr. Johnson's office on Friday, January 6, and Tuesday, January 10, to find out if any of the records requested were exempt or confidential records due to the ongoing criminal investigation, but Mr. Johnson did not return the calls.

On Wednesday, January 11, 2006, Mr. Purdon called the Association regarding his records request. Mr. Howard told Mr. Purdon he had forwarded Mr. Purdon's request to the McKenzie County state's attorney and that the state's attorney told Mr. Howard he was going to contact the North Dakota Attorney General's office to determine whether the requested records were open records and whether some of the information was exempt or confidential.¹ Mr. Howard also told Mr. Purdon that on the previous day, January 10, Mr. Howard had left a message with the state's attorney seeking advice regarding the open records request.

On Friday, January 13, Mr. Purdon faxed a second letter to the Association restating his position that his client was entitled to all of the client's brand inspection records. Following receipt of that letter, Mr. Howard made arrangements to drive to Watford City the following Tuesday, January 17, 2006, to personally meet with the state's attorney. At the meeting, the state's attorney told Mr. Howard that the Association was free to disclose all of the records in the Association's files indexed under the name of Ms. Reichman or Ms. Reichman's business. Mr. Howard returned to the Association's office in Bismarck on January 18, and that same day mailed the records located in the

¹ According to my staff, Mr. Johnson did not contact this office until January 17, 2006, 14 days after he received notice of the request for records.

Bismarck office to Mr. Purdon. The letter accompanying the records mailed to Mr. Purdon stated that the Association was providing documents except those that were a part of the ongoing criminal investigation.

The Association did not provide copies of the fieldman's investigation notes or the fieldman's letter explaining Ms. Reichman's violation to the state's attorney and asking him to file charges against her. Both of these documents were prepared at the request of the state's attorney.

ISSUES

1. Whether the Association is a public entity subject to the open records laws.
2. Whether the Association violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.
3. Whether the Association violated N.D.C.C. § 44-04-18 by withholding records that were not exempt active criminal investigative records as defined in N.D.C.C. § 44-04-18.7.

ANALYSES

Issue One: Whether the Association is a public entity subject to the open records laws.

The state's open records laws apply to "public entities."² Although the Association is a nonprofit corporation, it is subject to the state's open records laws if it is supported by public funds or is expending public funds,³ is recognized by state law to exercise public authority or to perform a governmental function, or is an agent or agency of a public entity performing a governmental function on behalf of the public entity.⁴

The Association is a nonprofit corporation that was organized by a group of cattle producers more than 70 years ago.⁵ In 1949, the Legislature designated the Association as the sole entity authorized to conduct brand inspections in North Dakota.⁶

The Association is also responsible for registering feedlots and recording marks and brands.⁷ The Association is acting as an agent of the state and performing a

² N.D.C.C. § 44-04-18.

³ N.D.C.C. § 44-04-17.1(9), (12)(c); N.D.A.G. 2006-O-02.

⁴ N.D.C.C. § 44-04-17.1(12), (15); N.D.A.G. 98-O-21.

⁵ See North Dakota Stockmen's Association Website at <http://www.ndstockmen.org/> (last visited March 1, 2006).

⁶ 1949 N.D. Sess. Laws ch. 231, § 2; N.D.C.C. § 36-22-02.

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governmental function when providing brand inspection and recording services.⁸ In addition, the Legislature provides a continuing appropriation to the Association and the fees the Association collects and expends for its support are public funds.⁹ Therefore, it is my opinion the Association is subject to the open records law.

Issue Two: Whether the Association violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.

All records of a public entity are open to the public unless otherwise specifically provided by law.¹⁰ Upon a request for a copy of specific public records, an entity must, within a reasonable time, furnish the requester one copy of the records requested¹¹ or explain why the records are not being provided. Although N.D.C.C. § 44-04-18 does not usually require an immediate response, the delay permitted in ordinary situations will usually be measured in a few hours or a few days rather than several days or weeks.¹² “Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention.”¹³ Whether records have been provided within a reasonable time will depend on the facts of a given situation.¹⁴

In this case, Mr. Purdon’s request for records was sent on Friday, December 30, 2005. The chief brand inspector responsible for this matter was out of the office that day and did not get the request until the following Tuesday, January 3, 2006. Upon receipt of the request, Mr. Howard faxed it to the state’s attorney handling the criminal investigation pertaining to Mr. Purdon’s client. On Wednesday, January 4, 2006, the state’s attorney told Mr. Howard not to release any records until he could look into the matter. Thereafter, Mr. Howard contacted the state’s attorney’s office on Friday, January 6 (three days after the request was received), and Tuesday, January 10 (seven days after the request was received), attempting to elicit from the state’s attorney exactly which records he could release given the ongoing criminal investigation. Finally, as part of his effort to determine which records he could release, he drove to Watford City and met with the state’s attorney and the fieldman. The following day, January 18,

⁷ N.D.C.C. §§ 36-01-30; 36-05-10; 36-05.1-05; N.D.C.C. chs. 36-09, 36-13, 36-22.

⁸ Billey v. N.D. Stockmen’s Ass’n, 579 N.W.2d 171 (N.D. 1998); United States v. Robinson, 106 F.Supp. 212, 217-18 (D.N.D. 1952).

⁹ Billey, 579 N.W.2d at 176; N.D.C.C. §§ 36-09-18, 36-22-01.1; N.D.A.G. 96-F-18.

¹⁰ N.D.C.C. § 44-04-18(1).

¹¹ N.D.C.C. § 44-04-18(2).

¹² N.D.A.G. 2004-O-07; N.D.A.G. 2002-O-06.

¹³ N.D.A.G. 2002-O-06.

¹⁴ N.D.A.G. 98-O-03.

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2006, upon his return, he mailed all of the records in the Association's files to Mr. Purdon. He did not mail the letter the fieldman wrote to Mr. Johnson explaining Ms. Reichman's violation and requesting Mr. Johnson to file charges or the fieldman's handwritten notes, which were retained in the state's attorney's investigative file.

The chief brand inspector and all fieldmen employed by the Association have the power of a police officer for the purpose of enforcing brand laws and other state laws or rules relating to livestock. Their enforcement powers, however, do not include the power to prosecute a crime. That must be done by the state's attorney. In this case, the Association determined that Ms. Reichman had violated the brand inspection law and requested the state's attorney to file charges against her. Although the state's attorney is not the attorney for the Association, the Association and the state's attorney were using their powers to jointly enforce the brand inspection laws. Therefore, it was reasonable for the Association to consult with the state's attorney to determine what records it could release without jeopardizing the criminal investigation. The Association's delay was caused by the state's attorney's failure to let the Association know what records it could release. It is evident that Mr. Howard diligently and continually attempted to contact the state's attorney to elicit from him which records he could release. As previously noted, Mr. Howard called the state's attorney's office on three occasions, and finally drove to Watford City to confer with the state's attorney and resolve the open records request. Moreover, after receiving the state's attorney's advice, Mr. Howard promptly sent the records to Mr. Purdon the following day. Therefore, even though the Association's actions were reasonable and prudent, it is my opinion that the delay in providing the records was unreasonable. A citizen's right to obtain public records, or to be notified of the legal basis for not disclosing records, cannot be excused because the entity has failed to receive timely legal advice. Accordingly, the Association violated N.D.C.C. § 44-04-18 by failing to provide a copy of records within a reasonable time.

Issue Three: Whether the Association violated N.D.C.C. § 44-04-18 by withholding records that were not exempt active criminal investigative records as defined in N.D.C.C. § 44-04-18.7.

A public entity must disclose all public records that have been requested, except for information that is confidential or exempt.¹⁵ Active criminal investigative information is exempt from the open records law.¹⁶

"Criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific

¹⁵ N.D.C.C. § 44-04-18(1); see N.D.A.G. 2005-O-13; N.D.A.G. 98-F-13.

¹⁶ N.D.C.C. § 44-04-18.7(1); N.D.A.G. 2005-O-13.

act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Criminal investigative information must be considered “active” as long as it is related to an ongoing investigation that is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future.¹⁷

“Criminal justice agency” is defined as:

“Criminal justice agency” means any law enforcement agency or prosecutor. The term also includes any other unit of government charged by law with criminal law enforcement duties or having custody of criminal intelligence or investigative information for the purpose of assisting law enforcement agencies in the conduct of active criminal investigations or prosecutions.¹⁸

The police powers of the Association’s chief brand inspector and its fieldmen are specified in N.D.C.C. § 36-09-24. That section provides:

36-09-24. Police powers of chief brand inspector and fieldmen.

The chief brand inspector and all fieldmen employed by the North Dakota stockmen’s association have the power:

1. Of a police officer for the purpose of enforcing brand laws and any other state laws or rules relating to livestock.
2. To make arrests upon view and without warrant for any violation of this chapter or any other state laws or rules relating to livestock committed in the inspector's presence.
3. To respond to requests from other law enforcement agencies or officers for aid and assistance. For the purposes of this subsection, a request from a law enforcement agency or officer means only a request for assistance to a particular and single violation or suspicion of violation of law, and does not constitute a continuous request for assistance.

The Association, with respect to its law enforcement activities, meets the definition of a criminal justice agency. It therefore had the authority to withhold active criminal

¹⁷ N.D.C.C. § 44-04-18.7(3).

¹⁸ N.D.C.C. § 44-04-18.7(4).

investigative information. Accordingly, it is my opinion that the Association did not violate N.D.C.C. § 44-04-18 when it did not provide the fieldman's investigation notes or the fieldman's letter explaining the client's violation to the state's attorney and asking him to file charges against her.

CONCLUSION

1. The Association is a public entity subject to the open records laws with respect to enforcement of brand laws.
2. The Association violated N.D.C.C. § 44-04-18 by failing to provide a copy of records within a reasonable time.
3. The Association did not violate N.D.C.C. § 44-04-18 by failing to disclose records relating to an active criminal investigation.

STEPS NEEDED TO REMEDY VIOLATION

Since the Association has provided the requester with the records required to be released, no further remedy is available.

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Attorney General

Assisted by: Michael J. Mullen
Assistant Attorney General

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